No. 80-637

In the Supreme Court of the United States

OCTOBER TERM, 1980

SUNNYSIDE VALLEY IRRIGATION DISTRICT,
PETITIONER

v.

KITTITAS RECLAMATION DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether "dead storage" water below the outlet works of Cle Elum Reservoir should be allocated under the terms of a consent decree entered on January 31, 1945.

2. Whether distribution of dead storage water, outside the terms of the consent decree, takes property of the petitioner within the meaning of the Fifth Amendment.

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The opinion of the court of appeals (Pet. App. A-1 to A-12) is reported at 626 F.2d 95. The opinion of the district court (Pet. App. A-14 to A-18) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1980. A timely petition for rehearing was denied on September 10, 1980 (Pet. App. A-13). The petition for a writ of certiorari was filed on October 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A consent decree executed by, among others, the parties in this case and entered on January 31, 1945, defines the obligations of the United States Bureau of Reclamation to deliver water to and among certain users in the Yakima Watershed, located in South Central Washington State. The central dispute in this case is whether water that could not be distributed at all when the decree was entered, but which is now available, must be distributed in accordance with the decree. After the construction of the Cle Elum Dam and before 1977, "dead storage" or "substorage" water lower than the outlet works of the dam could not be used for irrigation.[1] At a cost of about $2.7 million, the

[1] The water now termed "dead storage" in Cle Elum Reservoir was originally a naturally formed lake in the Cle Elum River, a tributary of the Yakima River (R.A. 513). "R.A." refers to the record on appeal; "1978 Tr." refers to the transcript of the hearing in district court on June 5, 1978.

United States Bureau of Reclamation installed pumps on a floating barge to lift the dead storage water to the outlet works in 1977 (R.A. 465). The dead storage water then became physically available for irrigation use.

Use of water for irrigation in the Yakima Watershed has a long and complex history. Prior to 1902, individual irrigators and ditch companies had appropriated the entire natural low-water flow of the river and its major tributaries (1978 Tr. 13). Although the companies had built extensive diversion works, there was little artificial storage capacity. Upon enactment in 1902 of the Reclamation Act, ch.1093, 32 Stat. 388, 43 U.S.C. 372 *et seq.*, and enabling legislation in Washington State, Wash. Rev. Code Ann. § 90.40.010 *et seq.* (1962), the Bureau of Reclamation undertook to provide storage capacity in the Yakima Watershed.

In 1905, the United States reserved all the unappropriated water in the Yakima River and its tributaries, including the Cle Elum Lake, for use in a future reclamation project pursuant to Wash. Rev. Code Ann. § 90.40.030 (1962). Upon completion of the construction of the Yakima Reclamation Project, permits for appropriation of the water actually used by the project were issued to the United States and the reservation of the remaining water was extinguished. No permit was issued for the dead storage water in Cle Elum Reservoir and the water remains unappropriated water of the State of Washington (1978 Tr. 27-28).

In developing the Yakima Reclamation Project, the Bureau purchased the water appropriations and the irrigation system of the Washington Irrigation Company and assumed that company's rights and obligations to its users (R.A. 136). The Bureau also contracted to deliver water under both Section 4 of the Reclamation Act, 43 U.S.C. 419, and Section 1 of the Warren Act of 1911, 43 U.S.C. 523. In addition, the Bureau con-

tracted to provide supplemental storage rights to users who had "natural flow rights" (R.A. 137). Thus there were a variety of rights to the water controlled by the Bureau of Reclamation in the Yakima Watershed, including: (1) natural flow rights, (2) supplemental storage rights, (3) project storage rights (also known as public notice rights), and (4) Warren Act rights. An individual irrigation district often held rights in more than one of these categories.

In the 1930's, water users in the Yakima Watershed initiated litigation to determine the appropriate scope of the Bureau's power to allocate and charge for water distributed under the Yakima Project. See *Ickes* v. *Fox*, 300 U.S. 82 (1937), aff'g 85 F.2d 294 (D.C. Cir. 1936); *Fox* v. *Ickes*, 137 F.2d 30 (D.C. Cir.), cert. denied, 320 U.S. 792 (1943); *Kittitas Reclamation District*, v. *Sunnyside Valley Irrigation District*, Civ. No. 21, terminated by consent decree (E.D. Wash. Jan. 31, 1945). After the decision on the merits in *Fox* v. *Ickes*, *supra*, indicating that the rights of the users to waters distributed under the project were to be determined by reference to the laws of the State of Washington and not contracts with the Bureau, the parties in *Kittitas*, *supra*, executed the consent decree that is the subject of this litigation.

The decree does not, however, establish any property rights in the water; it merely defines the obligation of the Bureau to deliver water out of the available supply (R.A. 140). Its express purpose is to apportion "the available supply" of irrigation water (*ibid.*). The decree establishes "[t]he obligations of the United States to deliver water from the natural flow of the Yakima River, and its tributaries, from storage in its various reservoirs on the Yakima watershed, and from other sources * * *" (R.A. 145). Rather than attempt to quantify and assign priorities to the pre-existing

categories of rights to irrigation water, the parties to the decree created two new categories: non-proratable rights and proratable rights (R.A. 169–172). Each irrigation district or user was assigned an amount of water to be delivered during the irrigation season. For those irrigation districts or users that had water rights considered superior, a portion of the water was designated as exempt from proration in the event of shortage (R.A. 170–172). In establishing the proration formula, the decree defines the "total water supply available" as the natural flow of the river and its tributaries, the storage of the various reservoirs, and other sources (R.A. 170). Perhaps because all planned storage units of the Yakima project were complete in 1945, the decree does not expressly address expansion of the water supply through alteration or additional construction of storage facilities.

In 1977, there was a severe drought in the Yakima area. The natural flow of the Yakima River was so reduced that early estimates projected that it would satisfy less than 50% of the non-proratable water rights. The balance of the non-proratable rights were to be satisfied from storage water in reservoirs and return flows from other users (R.A. 177). Consequently, those irrigation districts with only proratable water rights, including Roza Irrigation District and Kittitas Reclamation District, would have suffered an extreme reduction in the amount of water delivered. For example, early estimates indicated that one of these districts would receive only six percent of its normal supply of water (R.A. 178).

In response, on March 18, 1977, the Roza Irrigation District filed a motion with the district court to reopen and interpret the consent decree in a manner which would grant Roza additional water (R.A. 174). Kittitas Reclamation District developed a plan to obtain additional water by pumping the dead storage water lo-

cated below the outlet works at Cle Elum Reservoir (R.A. 183–188). On April 8 and 13, 1977, the United States filed motions with the district court for appointment of a water master to supervise the distribution of water in the area and for permission to pump the dead storage water from Cle Elum for the benefit of Roza Irrigation District and Kittitas Reclamation District (R.A. 208, 265).

On April 26, 1977, the district court denied the motion to reopen and interpret the consent decree (R.A. 446–447). The court also denied the United States' motion for permission to pump the dead storage water from Cle Elum Reservoir, stating that the dead storage water was outside "the provisions of the Judgment of January 31, 1945" (R.A. 448).

The United States obtained an emergency permit from the State of Washington to appropriate the dead storage water. See 1977 Wash. Laws, ch. 1 (First Extraordinary Sess.). The government spent $2,700,000 install pumps on a floating barge to lift the dead storage water to the outlet works at Cle Elum Dam (R.A. 465). The actual 1977 water supply was greater than the early estimates, and the dead storage pumping system was not used.

The emergency permit to appropriate the dead storage water expired at the close of the 1977 irrigation season. The United States has filed an application for a permit to appropriate the dead storage water permanently (for the benefit of Roza and Kittitas) (1978 Tr. 28–29). This permit application is still pending before the State.

On March 13, 1978, Roza Irrigation District filed a motion for interpretation of the consent decree to exclude the dead storage of Cle Elum lake from the waters governed by the decree (R.A. 461). The district court granted this motion. It ruled that withdrawal of

dead storage water from Lake Cle Elum "was not within the contemplation of the parties when the 1945 decree was entered" (Pet. App. A-15 to A-16). It was new project water which had recently been made available by the efforts and expenditures of the government, and not water subject to allocation under the consent decree (Pet. App. A-16). In deference to state water authorities, however, the court further stated that its order should not be deemed to authorize the withdrawal of dead storage waters unless and until the State of Washington approves the pending application to appropriate the water (Pet. App. A-16 to A-17). Because of the obvious relationship between the dead storage waters and the waters subject to the 1945 consent decree, the district court conditioned withdrawal of the dead storage waters upon satisfaction of the monthly allocations under the 1945 decree (Pet. App. A-17 to A-18).

The court of appeals affirmed. The court found that the consent decree could be fairly read to include or exclude the dead storage waters (Pet. App. A-7). Noting that a consent decree, like a contract, should be construed on the basis of the language of the decree and in light of the surrounding circumstances (Pet. App. A-7), the court of appeals held that the district court's conclusion that the decree did not include dead storage water was a reasonable interpretation of the consent decree (Pet. App. A-8 to A-9). The court of appeals also affirmed the district court's characterization of the dead storage water as "project water" and the limitation on withdrawal of the water to prevent interference with the rights recognized in the 1945 consent decree (Pet. App. A-9 to A-10).

ARGUMENT

This case presents no issue warranting review by this Court. The judgment of the court of appeals is

correct and does not conflict with any decision of this Court or any other court of appeals.

1. Petitioners contend that the decisions of the district court and court of appeals are in error because they failed to give adequate consideration to the purpose of the consent decree or to the circumstances surrounding its formation (Pet. 17–18). The court of appeals, however, explicitly noted the rulings of this Court that consent decrees are to be interpreted like contracts with reference to the circumstances underlying the decree as aids to construction (*United States* v. *Armour & Co.*, 402 U.S. 673 (1971); *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223 (1975)) (Pet. App. A–7). The present decision is merely an application of these principles to a concrete factual situation.

As the court of appeals stated, the consent decree may fairly be read to exclude or include the dead storage water (Pet. App. A–7). The decree does not expressly address expansion of the water supply available for use through alteration or additional construction of storage facilities. If the consent decree were read to include water made available through new or supplemental construction, it would be a substantial barrier to investment in new project work in the Yakima Watershed. Under the Reclamation Project Act of 1939, no water may be delivered from a new or supplemental project unless a contract is executed which provides the user with a first, preferred right to a stated share of the project's available water supply. 43 U.S.C. 485h(d) and (e). Such a contract cannot be executed with the irrigation districts most in need of additional water—those with only proratable water rights—if subsequently created supplies of water are

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[2] In fact, the water made available by installation of the floating pumps in Cle Elum Reservoir has not yet been distrib-

to be distributed subject to the consent decree.[2] The court of appeals' decision affirming the district court's interpretation of the consent decree thus leads to a reasonable result consistent with the language of the decree.

Interpretation of the 1945 consent decree does not present a question of sufficient importance to warrant review by this Court. The consent decree is unique and followed a long and complicated history of water appropriation in the Yakima Watershed. The precise issue considered by the lower courts, moreover, dealt with the unusual situation of dead storage water which was originally a naturally formed lake subject to independent appropriation under state law. The opinion of the court of appeals, therefore, does not have significant import for generally applicable water law under the Reclamation Act.

2. Petitioner's contention (Pet. 24) that the decision in this case conflicts with that in *Fox* v. *Ickes*, 137 F.2d 30 (D.C. Cir. 1943), rests on the erroneous premise that petitioner had a vested water right in the beneficial use of Cle Elum dead storage water. In *Fox* v. *Ickes*, *supra*, the court of appeals ruled that the Reclamation Act did not authorize the Secretary of the Interior to impose additional construction charges for the delivery of water in which irrigation users had already acquired a vested property right because of their prior beneficial use of the water. *Id.* at 33–35. In the present case, the dead storage waters are unap-

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uted, in part, because no contract for reimbursement of installation costs has been executed. The irrigation districts with solely proratable water rights under the 1945 decree indicated at the hearing in district court that they could not execute such a contract if the consent decree were interpreted to cover the dead storage water in Cle Elum Reservoir (1978 Tr. 32).

propriated waters of the State of Washington,[3] and petitioner has no property right in their use.

Petitioner's suggestion (Pet. 21–22) that the dead storage waters were appropriated as support or foundation for water that was beneficially used is misleading. Although the State of Washington may recognize some forms of non-consumptive use as beneficial use sufficient to support an appropriation, the State has indicated that the dead storage waters in this case have not been appropriated by beneficial use (1978 Tr. 28–29).

3. Petitioner's claim (Pet. 27–28) that the interpretation of the consent decree to exclude dead storage water is an uncompensated taking of their property proscribed by the Fifth Amendment fails on its premise. Petitioner has no property interest in the dead storage water. Withdrawal of dead storage water in accordance with the decisions of the courts below (Pet. App. A–18, A–9 to A–10) will have virtually no effect on petitioner's property interests in the water covered by the decree (*i.e.*, live storage, Pet. App. A–17).

Petitioner also asserts (Pet. 27–28) that under certain conditions in the future the limitations on withdrawal of dead storage water imposed by the district court may not be adequate to protect their right to receive water from live storage in the Cle Elum Reser-

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[3] Petitioner's contention that the dead storage waters were appropriated pursuant to permit number 97 (Pet. 7) is erroneous. As stated above, all water in the Yakima Watershed was withdrawn to permit development of the Yakima project in the early 1900's. When the Yakima project was finished, permits for appropriation of the water actually used by the project were issued to the United States. No permit was issued for the dead storage water in Cle Elum Reservoir. Counsel for the State of Washington made it clear in the district court that the dead storage waters were public waters of the State and not heretofore appropriated (1978 Tr. 28–29).

voir. Those circumstances, however, have not yet occurred and may never be presented. In fact, for lack of both a repayment contract and a state permit to appropriate the dead storage water, and, recently, apparent partial destruction of the floating pumps, no water has been withdrawn from dead storage. In any event, such speculative potential interference with petitioner's interests is not a "taking" for purposes of the Fifth Amendment. See, *e.g.*, *Agins* v. *City of Tiburon*, No. 79-602 (June 10, 1980), slip op. 6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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